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No. 1183

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IN THE

Supreme Court of the United States

October Term, 1969

ISIDORE ENGELMAN,

Petitioner,

against

WILLIAM CAHN, as District Attorney of the County of Nassau, State of New York, and others,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Isidore Engelman respectfully prays that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit rendered on December 15, 1969, vacating a temporary injunction theretofore granted and directing the dismissal of the complaint.

Opinions Below

In the United States District Court for the Eastern District of New York no opinion was rendered by Travia, D. J., the docket entry being "No opposition—Motion granted. Submit order on notice." The United States Court of Appeals for the Second Circuit rendered an opinion (by Friendly, Circ. J.), a copy of which is hereto annexed.

Jurisdiction

The judgment of the aforesaid Court of Appeals sought to be reviewed herein was rendered on December 15, 1969.

The jurisdiction of this Court is invoked under 28 U. S. Code Sec. 1257. The jurisdiction of the United States Dstrict Court was based on 28 U. S. Code Sec. 1343(3) and 42 U. S. Code Sec. 1983.

Question Presented for Review

Where wiretap evidence has been obtained and divulged in conceded violation of former Sec. 605 of the Federal Communications Act (47 U. S. Code Sec. 605), so that under controlling decisions of this Court it will be inadmissible in a state criminal prosecution not yet brought to trial or in any future administrative proceeding, is the defendant in that prosecution (petitioner herein) entitled to maintain an action in the federal Court to declare such evidence to have been unlawfully obtained and to enjoin the state prosecutor from using or disclosing such evidence for any purpose?

Constitutional Provisions

Petitioner urges that the acts and conduct of respondents are violative of his rights under the Constitution of the United States, specifically, Article VI (supremacy provision), Amendment IV, as implemented by Amendment XIV, and Amendment XIV.

Statement of Case

There is no substantial dispute as to the facts and proceedings in the Courts below.

On January 26, 1968, one DePaola, a detective, swore to an information charging petitioner and another with

violating former Sections 580, subd. 1, and 986 of the Penal Law of the State of New York (conspiracy to engage in bookmaking, and the substantive misdemeanor of bookmaking). The dates of the alleged offenses were between April 21, 1967, and June 12, 1967. The complaint was specifically stated to be based on information and belief, founded on "telephone conversations of the defendants monitored by the complainant pursuant to wire tap order of the County Court, Hon. Albert Oppido, dated April 17th, 1967." A warrant of arrest was issued accordingly: petitioner surrendered on January 30, 1968, on which day he pleaded not guilty.

Petitioner filed suit in the United States District Court on February 29, 1968, alleging that New York Code of Criminal Procedure Sec. 813-a was unconstitutional (as this Court held in *Berger* v. *New York*, 388 U. S. 41), and that the wire tapping done by respondents was illegal. The Court of Appeals below, making no reference to the allegation of illegality, put it (p. 759):

> "Alleging that such wire-tapping violated his rights under the Fourth and Fourteenth Amendments, Engelman sought declaratory and injunctive relief with respect to the use of the wiretapped conversations in the pending criminal prosecution or before any court as well as an order directing all tapes or transcripts of the conversations to be surrendered to him or destroyed."

It was further shown that petitioner is the holder of a license to operate a retail liquor store and that if the respondents transmitted the recordings to the State Liquor Authority, he would probably face revocation of his license and deprivation of his means of livelihood.

After divers interlocutory proceedings petitioner moved in the United States District Court for an injunction. Respondents obtained a three-week adjournment, and when the motion finally came on for hearing on May 28,

1969, no one opposed it or submitted any answering papers. It was thus granted on default before Travia, D. J., the docket entry reciting "No opposition—Motion granted," and an order was entered accordingly on June 11, 1969. Nevertheless, respondents appealed to the United States Court of Appeals, Second Circuit, from that order. The latter Court requested affidavits as to whether there had in fact been any intention to oppose the order. Incidentally, petitioner challenged the right of respondents to take any appeal, as well as the right of respondent William Cahn to represent them, in view of New York County Law, Sec. 501, giving the County Attorney the exclusive right to defend all civil actions brought against county officers for their official acts. The County Attorney, in his official capacity, did not appeal.

The Court of Appeals vacated the temporary injunction and remanded the cause with instructions to dismiss the complaint, on the opinion of Friendly, Circ. J., copy of which is hereto appended.

Reasons for Allowance of Writ

As is suggested above in the question presented for review, petitioner's basic contention is as follows:

Since it is incontrovertible that the wiretaps in the possession of respondents were procured in contravention of petitioner's rights, so as to render them inadmissible in any criminal prosecution or administrative proceeding, petitioner is entitled to have the federal Court so declare and enjoin their use.

That the use of the wiretaps herein is barred has been clearly declared by this Court in the two recent decisions in *Lee* v. *State of Florida*, 392 U. S. 378 (June 17, 1968), and *Fuller* v. *Alaska*, 393 U. S. 80 (October 28, 1968). The first of these cases held that recordings procured by police interception of the accused's telephone conversations in vio-

lation of 47 U. S. Code Sec. 605 (prohibiting unauthorized interception and divulgence) were inadmissible in a state court prosecution for violation of lottery laws, while *Fuller* held that "the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee*." In view of the foregoing holdings, inasmuch as respondents have not yet brought petitioner to trial and did not utilize the forbidden evidence before June 17, 1968, they are forever precluded from making any use of it. Nevertheless, since they have evidenced an intent to the contrary, petitioner properly sought a declaratory judgment and an injunction in support of his indubitable rights.

The Court of Appeals herein referred to the two authorities cited and, indeed, recognized (pp. 760-761) that this Court decided in *Kaiser* v. *New York*, 394 U. S. 280, that "neither *Lee* nor *Katz* (389 U. S. 347) required overturning a conviction resting on wiretap evidence obtained pursuant to an order under Sec. 813-a where the wiretap was nontrespassory (as apparently was the case here) and occurred prior to the date of *Katz* and the wiretap evidence was introduced prior to the date of *Lee*."

In spite of the recognition by the Court of Appeals of the merit in petitioner's posture, it concluded in substance that the doctrine of abstention barred him from invoking the Federal courts for relief. Citing a number of peripheral and inapplicable cases, the Court declined to intervene to "bring a state prosecution to a halt,"—in effect brushing aside the circumstances that petitioner merely asks for a declaratory judgment and an injunction only against the use of proscribed evidence either in the bookmaking case or in administrative channels. Where the challenged evidence was obtained under a New York procedural statute declared unconstitutional by this Court and in violation of a federal statute, his recourse to the federal Court was perfectly legal.

Actually the point is concluded by this Court's decision in *Zwickler* v. *Koota,* 389 U. S. 244, where Mr. Justice Brennan wrote:

> "It is better practice, in a case raising a federal constitutional *or statutory* claim, to retain jurisdiction rather than to dismiss" (italics supplied).

Instead of explaining why that case does not control herein, the Court below merely mentioned it in a footnote (p. 765), suggesting that it applied only in a situation where "the state courts will narrowly construe a statute and thus render it impervious to constitutional attack." We fail to perceive how that attempted differentiation has the slightest applicability herein.

Soon thereafter, in *Cameron* v. *Johnson,* 390 U. S. 611, Mr. Justice Brennan wrote for this Court:

> "In *Zwickler* we held that it was error in the absence of special circumstances to abstain and refuse to render a declaratory judgment."

The underlying rationale of *Zwickler* is that abstention "'would impose expense and long delay upon litigants . . .'" (p. 251). While agreeing that the evidence is inadmissible, the Court below nevertheless would require petitioner to defend his person and livelihood before other courts as well as administrative tribunals.

The decision of the Court of Appeals herein seems to be at variance with its own holding in *Holmes* v. *New York City Housing Authority,* 398 F. 2d 262, where it held (by Anderson, Cir. J.)

> "At least in actions under the Civil Rights Act the power of a federal court to abstain from hearing and deciding the merits of claims properly brought before it is a clearly restricted one which may be

> invoked only in a narrowly limited set of 'special circumstances.' Zwickler v. Koota, 389 U. S. 241; cf. Allegheny County v. Frank Mashuda Co., 360 U. S. 185. In enacting the predecessor of Section 1983 Congress early established the federal courts as the primary forum for the vindication of federal rights, and imposed a duty upon them to give 'due respect' to a suitor's choice of forum . . . Where a district judge chooses to exercise his equitable discretion in favor of retaining such an action it will be unusual indeed when an appellate court refuses to uphold his decision."

In view of that recent prior holding of the same Court, it would appear that the decision sought to be reviewed herein creates an irreconcilable inconsistency in the law of the Second Circuit, wholly apart from its untenability in the light of the Supreme Court's applicable declarations. Further appellate review seems highly desirable for a final reclarification of the law on the subject.

It may also be noted that the Court below made passing reference to the amendments to 47 United States Code Sec. 605, enacted on June 19, 1968. Disregarding the fact that subsequently this Court decided *Fuller* (October 28, 1968, and *Kaiser* [1969] which re-affirmed both *Fuller and Lee*), the Court below observed that "In light of the disposition we make of this case we express no views concerning their effect on antecedent wiretaps except to say that this is not free from doubt" (footnote, p. 759).

Finally, in the very recent case of *Sullivan* v. *Little Hunting Park*, 24 L. Ed. 386 (decided December 15, 1969), this Court reiterated the rule of *Jones* v. *Mayer Co.*, 392 U. S. 413, that even where the federal law provides no explicit method of enforcement, a federal court has power to fashion an effective federal remedy. The three dis-

senting Justices indicated that "The issues of what remedies a state court must or must not provide in cases involving federal rights is a most difficult and confusing area of the law."

In any event it is manifest that the present application presents meritorious and at least arguable questions on a subject likely to arise in connection with other cases and of a character calling for authoritative disposition.

The petition is filed in good faith and not for purposes of delay.

For the foregoing reasons, your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated, New York, N. Y., January 27, 1970.

ISIDORE ENGELMAN,
By JACOB W. FRIEDMAN,
Attorney for Petitioner.

ABRAHAM ENGELMAN,
of Counsel.

Opinion of United States Court of Appeals for the Second Circuit

FRIENDLY, *Circuit Judge*:

This action, in which federal jurisdiction was asserted under the jurisdictional implementation, 28 U.S.C. §1343 (3), of the Civil Rights Act, 42 U.S.C. §1983, was brought in the District Court for the Eastern District of New York in February 1968. The complaint alleged that on January 26, 1968, Detective DePaola, one of the defendants here, filed a two count information and complaint in the District Court of Nassau County, New York, charging Engelman and another with conspiring to violate and with substantively violating former §986 of the New York Penal Law relating to bookmaking. The state court complaint averred that the source of the detective's knowledge and the basis of his belief were "telephone conversations of the defendants monitored by the complainant pursuant to wire tap order of the County Court, Hon. Albert Oppido, dated April 17, 1967, wherein the complainant heard the defendants commit the aforesaid acts." Alleging that such wiretapping violated his rights under the Fourth and Fourteenth Amendments, Engelman sought declaratory and injunctive relief with respect to the use of the wiretapped conversations in the pending criminal prosecution or before any other court as well as an order directing all tapes or transcripts of the conversations to be surrendered to him or destroyed.

A flurry of papers followed. Plaintiff moved for a temporary injunction; he said something about convening a three-judge court to enjoin the enforcement of §813-a as unconstitutional but apparently the motion was not pressed. The defendants cross-moved to dismiss the complaint. After several adjournments both motions were argued before Judge Weinstein on June 26, 1968. By that

time the Supreme Court had decided *Lee* v. *Florida*, 392 U.S. 378 (1968), overruling *Schwartz* v. *Texas*, 344 U.S. 199 (1952), and holding that wiretap evidence obtained and divulged in violation of former §605 of the Federal Communications Act, 47 U.S.C. §605 (1964 ed.), is inadmissible in state criminal prosecutions. Since then the plantiff, who had earlier disavowed any reliance on §605, appears to have considered it to be the heart of his case, while the defendants, who had earlier spent considerable time arguing the inapplicability of the section, have emphasized that it was not mentioned in the complaint and that the complaint has never been amended to refer to it.[1] Something seems to have been said about Engelman's holding some kind of license from the State Liquor Authority and the effect thereon of the wiretap evidence of gambling, see N. Y. Alcoholic Beverage Control Law, §118, and everyone appears to have considered this as part of the case although no one bothered to amend the complaint to state it. Noting an indication by the District Attorney "that he has no intention to use the wiretap evidence" in the criminal prosecution and a representation that the evidence would not be furnished to the Liquor Authority pending the decision in *Kaiser* v. *New York, cert. granted*, 390 U.S. 1023 (1968), which the judge thought would probably determine the retroactive effect of *Lee*, the court denied both motions without prejudice to their renewal.

The Supreme Court found occasion to speak to the retroactivity of *Lee* even before it decided *Kaiser*. Addressing itself to a pre-*Lee* trial, it said in *Fuller* v. *Alaska*, 393 U.S. 80 (1968), that "the exclusionary rule is to be

[1] The papers below made no reference to the drastic changes in the federal wiretap law affected by the Omnibus Crime Control and Safe Streets Act, 82 Stat. 212, enacted on June 19, 1968. In light of the disposition we make of this case we express no views concerning their effect on antecedent wiretaps except to say that this is not free from doubt.

applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee.*" On March 24, 1969, in *Desist* v. *United States,* 394 U.S. 244, the Court announced that *Katz* v. *United States,* 394 U.S. 244 (1969), 389 U.S. 347 (1967), which overruled the doctrine that only trespassory eavesdrops or intrusions into constitutionally protected areas could rise to the level of unconstitutional searches and seizures, would be given "wholly prospective application," 394 U.S. at 246, to wit, "only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967." 394 U.S. at 254. The same day the Court decided *Kaiser* v. *New York,* 394 U.S. 280 (1969), and held that neither *Lee* nor *Katz* required overturning a conviction resting on wiretap evidence obtained pursuant to an order under §813-a where the wiretap was nontrespassory (as apparently was the case here) and occurred prior to the date of *Katz* and the wiretap evidence was introduced prior to the date of *Lee.*

Meanwhile Engelman had renewed a motion to suppress in the state court, which had previously been denied. Although the new motion was made before *Fuller, Kaiser* and *Desist,* argument was postponed until after these cases were decided, and the court then reserved decision.[2] A fortnight later plaintiff renewed his motion for a temporary injunction in the federal suit, contending among other things that the danger of prejudice before the Liquor Authority required the injunction regardless of what the state criminal court might decide on the motion to suppress on the bookmaking charge. After the defendants had obtained a three week adjournment, the motion came on before Judge Travia on May 28, 1969. The docket entry recites "No opposition—Motion granted. Submit order on

[2] Although the state judge ultimately denied the motion to suppress without prejudice to its renewal, this was because he thought the federal injunction subsequently entered had rendered the issue academic.

notice." On June 11 the court entered an order enjoining defendants *pendente lite* from offering any wiretapped conversations monitored or recorded pursuant to the order under §813-a "as evidence or proof, or for any other purpose in any action or proceeding before any court, person, or any administrative agency, or in any manner whatever."

Defendants promptly appealed to this court. On August 6, 1969, they obtained an order granting a preference and dispensing with briefs on appeal but directing that an appendix be filed within 20 days. Their sense of urgency then declined. The appendix was not filed until September 29, and the appeal was not brought on for argument until November 7. Meanwhile—and since—we have been subject to a deluge of affidavits and memoranda from the district attorney. The experience demonstrates the undesirability of granting dispensation from the simple provisions of the Federal Rules of Appellate Procedure save on the strongest showing of need.

The first question encountered is whether the injunction was in fact granted in the absence of opposition. Being unable to resolve this on the record, we requested the parties to furnish affidavits as to what occurred in the district court on May 28. While no one appeared there for the District Attorney, a Deputy County Attorney who was in court on another matter made known that the deputy in charge was engaged elsewhere. According to his affidavit, he requested an adjournment but was told by the judge there was no point in this in view of the *Lee*, *Fuller* and *Kaiser* decisions. The deputy says he stated he could not consent to the granting of the motion but had no papers to present. In light of this, and of the defendants' consistent history of opposing everything, we cannot think the motion was consented to except in the narrow sense that no one was on hand to speak against it that day. We therefore proceed to the merits.

The portion of the injunction relating to the use of evidence obtained by wiretapping in the state criminal proceeding would seem to fly in the face of *Stefanelli* v. *Minard,* 342 U.S. 117 (1951), which was followed in *Pugach* v. *Dollinger,* 365 U.S. 458 (1961), unless that decision is inapplicable when admission of the evidence would require reversal and unless such was the case here. The argument for such a view would be that *Stefanelli* and *Pugach* were designed simply to protect the doctrines of *Wolf* v. *Colorado,* 338 U.S. 25 (1948), and *Schwartz* v. *Texas,* 344 U.S. 199 (1952), from backdoor attacks, but that the situation differs now that *Wolf* and *Schwartz* have been overruled.

We do not read *Stefanelli* as thus limited. See *Cleary* v. *Bolger,* 371 U.S. 392 (1963). Indeed it was the very inability of the petitioners in that case to protect their interests in the ordinary course of defense at trial and subsequent appeal that gave their position such limited plausibility as it had. See 342 U.S. at 119-20. The holding was "that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure." 342 U.S. at 120. Mr. Justice Frankfurter spoke eloquently of "perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States." *Id.* He mentioned that "the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment," *id.,* citing the anti-injunction statute, 28 U.S.C. §2283. The Court also noted that to sanction any such intervention as was proposed "would invite a flanking movement against the system of State courts by resort to the federal forum . . . , which conscientious counsel might be bound to em-

ploy, to subvert the orderly, effective prosecution of local crime in local courts," 342 U.S. at 123-24.

We are well aware of decisions, as far back as *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908), and *Bacon* v. *Rutland R.R.*, 232 U.S. 134 (1914), holding that although exhaustion of state administrative remedies is normally required, exhaustion of state judicial remedies is not. Even apart from the effect of 28 U.S.C. §2283, statements of the latter sort still leave intact, as we noted in *Potwora* v. *Dillon*, 386 F.2d 74, 77 (2 Cir. 1967), the historic rule, embodied in §16 of the First Judiciary Act, 1 Stat. 82 (1789), and later in Rev. Stat. §723 and 28 U.S.C. §384 (1940 ed.), that suits in equity shall not be sustained in courts of the United States "in any case where a plain, adequate and complete remedy may be had at law." The Supreme Court has affirmed the general applicability of this principle when the remedy at law is a motion to suppress or an objection in a state criminal prosecution both in *Cleary* v. *Bolger, supra,* 371 U.S. at 400-01, and in *Dombrowski* v. *Pfister,* 380 U.S. 479, 484-85 (1965). Indeed the Court there stated:

> "It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment," 380 U.S. at 485, n. 3 (1965).

We see no reason to think this is such a case.

We find no sufficient basis for reaching a different conclusion concerning the propriety of the portion of the order which enjoined the defendants from communicating evidence obtained by the wiretaps to the State Liquor Authority. The New York Court of Appeals has recently held the exclusionary rules to be fully applicable in proceedings before that agency, *Finn's Liquor Shop* v. *State Liquor Authority,* 24 N.Y.2d 647, 301 N.Y.S.2d 584 (1969), and

there is thus no ground for belief that any testimony resulting from wiretaps subsequent to December 18, 1967, or inadmissible as a consequence of a federal statute, will be there received. It is true that the anti-injunction statute, 28 U.S.C. §2283, is inapplicable since it relates only to *pending* state *court* proceedings. But, as we have pointed out, although *Stefanelli* relied in part on 28 U.S.C. §2283, it rested on larger principles of equity and federalism, which the Court has again recognized in the passages we have cited from *Dombrowski*. We also note that the injunction which the Supreme Court directed to be reversed in *Cleary* v. *Bolger, supra,* 371 U.S. at 395, included the use of evidence at an administrative proceeding before the Waterfront Commission.

Defendants have requested that we not merely reverse the temporary injunction but also direct dismissal of the complaint. Since our review has disclosed the lack of equity in the bill, that is the appropriate course.[3] See *Metropolitan Water Co.* v. *Kaw Valley Drainage District,* 223 U.S. 519, 523 (1912); *Triumph Hosiery Mills, Inc.* v. *Triumph Int'l Corp.,* 308 F.2d 196, 200 (2 Cir. 1962); *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 952 (1969).

The temporary injunction is vacated and the cause remanded with instructions to dismiss the complaint. In view of appellants' disregard of the terms of the order with respect to their expedited appeal, we deny costs.

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[3] That plaintiff sought declaratory as well as injunctive relief is no bar to this result. *Zwickler* v. *Koota,* 389 U.S. 241 (1967), where the Supreme Court distinguished between the two types of relief for purposes of the abstention doctrine, is not in point. This is not a case in which the federal court is asked to withhold relief in the hope that the state courts will narrowly construe a statute and thus render it impervious to constitutional attack. Rather, the denial of federal relief rests on the desire to avoid unnecessary friction between state and federal courts and piecemeal litigation of criminal cases. Declaratory judgments can be as dangerous as injunctions in that respect.

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Brownell, The Public Security and Wiretapping, 39 Cornell L.Q. 195, 1954	26
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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The Petition

Petitioner, Isidore Engelman, prays that a Writ of Certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit rendered on December 15, 1969 vacating a temporary injunction theretofore granted on June 11, 1969 by the Hon. Anthony J. Travia, D.J., United States District Court, for the Eastern District of New York, and further directing the dismissal of the complaint in the District Court.

Opinion Below

A copy of the opinion below is annexed hereto as Appendix "A".

Jurisdiction

The jurisdiction of this Court is apparently invoked under 28 U.S. Code Sec. 1257, according to the petition. It would seem, however, that the jurisdiction of this Court to be properly invoked should be under 28 U.S.C. § 1254.

The petition (p. 2) sets forth that the jurisdiction of the United States District Court was based on 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. It should be pointed out to this Court that petitioner's complaint in the United States District Court below, paragraph 4 thereof, invoked the jurisdiction of the District Court under and pursuant to 28 U.S.C. § 1343 and 28 U.S.C. § 2201, no mention being made in the complaint of 42 U.S.C. § 1983. This factor was discussed and disputed in respondents' reply memorandum, page 10, in the United States Court of Appeals below.

Question Presented

The main question presented is whether the defendant in a state prosecution (petitioner herein) is entitled to maintain an action in a Federal court to declare state evidence to have been unlawfully obtained and to enjoin the state prosecutor from using or disclosing such evidence for any purpose where the subject evidence consisted of tape recordings made pursuant to a state court wiretap order authorized and executed prior to this Court's decisions in *Berger* v. *New York*, 388 U.S. 41; *Kaiser* v. *New York*, 394 U.S. 280; *Desist* v. *United States*, 394 U.S. 244; *Katz* v. *United States*, 389 U.S. 347; *Lee* v. *Florida*, 392 U.S. 378; *Fuller* v. *Alaska*, 393 U.S. 80.

Specifically, petitioner seeks to have reviewed by this Court the question of whether the former Section 605 of the Federal Communications Act (47 U.S.C. § 605) renders inadmissible in a state criminal prosecution not yet brought to trial, the aforesaid wiretap evidence obtained as aforesaid.

Constitutional Provisions

Petitioner urges that the acts and conduct of respondents violate his rights under the Supremacy Provision of Article VI of the United States Constitution, Amendment IV, as implemented upon the states by Amendment XIV and Amendment XIV.

Statement of the Case

In January 1968 a Nassau County, New York detective by the name of DePaola, swore to an information in the First District Court of the District Court of Nassau County in Mineola, New York. The information charged the defendant with Conspiracy to Engage in the Crime of Bookmaking and the Crime of Bookmaking, both misdemeanors.

The sworn information or complaint indicated it was based partially on information and belief of the affiant. Specifically, DePaola swore that certain of his information was based upon "telephone conversations of the defendant monitored by the complaintant pursuant to wiretap order of the County Court, Hon. Albert Oppido, dated April 17, 1967."

Thereafter the petitioner filed suit in United States District Court for the Eastern District of New York, while the State Prosecution was awaiting trial. Petitioner's complaint sought a declaratory judgment, which in effect would declare unlawful and illegal the order of County Judge Oppido and any resulting wiretap evidence.

In addition, petitioner sought an injunction both temporary and permanent, the effect of which was to enjoin the prosecutor from ever utilizing or offering the wiretap evidence at a State Court criminal trial. The complaint also alleged that there was no adequate remedy at law

available and invoked the jurisdiction of the Court (in paragraph 4, thereof) pursuant to 28 U.S.C. § 1343 and 28 U.S.C. § 2201.

The claim by petitioner was that his constitutional rights under the 4th and 14th Amendments to the United States Constitution were violated by the respondents through and by use of the former Section 813A in the New York Code of Criminal Procedure which had authorized the original wiretap order, the unconstitutionality thereof being predicated upon this Court's decision in *Berger* v. *New York, supra.*

Thereafter, and in connection with the action in the United States District Court, the respondents moved to dismiss the complaint whereas the petitioner cross-moved for a temporary injunction.

On June 26, 1968 the Hon. Jack Weinstein, D.J., United States Eastern District of New York, denied both motions without prejudice to a renewal thereof. Judge Weinstein in a brief endorsed decision stated that the District Attorney had indicated he had no intention to use wiretap evidence and as a result there was no immediate danger of injury to the petitioner.

The Judge also stated that the defendant had not, at that time, adequately moved in the State courts to obtain available relief. Judge Weinstein also indicated that since *Kaiser* v. *New York, supra,* was then pending before this Court, this Court in that case would probably determine the retroactive effect of *Lee* v. *Florida.* Lastly, Judge Weinstein also indicated that the respondents represented at that time that they would not furnish the wire tap evidence to the State Liquor Authority until the disposition in this Court of the *Kaiser* case.

Thereafter, petitioner renewed his initial motion for a temporary injunction which resulted in Judge Travia's order, *supra.*

Following this, an appeal from Judge Travia's order was ultimately perfected before the United States Court of Appeals for the Second Circuit which resulted in the opinion and determination (Appendix "A") sought to be reviewed.

Reasons for Denying the Writ

1. The instant decision of the United States Court of Appeals for the Second Circuit is not at variance with its decision in *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262. An examination of that case will clearly indicate there was not involved a criminal prosecution but instead concerned a class action that sought, inter alia, to enjoin a State agency in the Federal courts.

Holmes, supra, involved a complaint in a class action by applicants for public housing where there was alleged deficiencies in the policies and selection procedures of the New York City Housing Authority. The jurisdiction there sought to be invoked was under 42 U.S.C. § 1983 and the court there found that the allegations raised were sufficient to state a claim for relief under the Civil Rights Act and due process clause of the Federal Constitution.

In so finding, the Court indicated at page 265, that that case was not an appropriate one for the invocation of the doctrine of the Federal Courts *abstaining* from or interfering with state laws and/or procedures.

In that very same case it was shown that a necessary pre-condition for the *abstention* of the Federal Courts is that there be shown that the Federal petitioners have plain, adequate and complete remedies in the state courts, which apparently was not the case in *Holmes, supra* (see Reason 3, *infra*).

2. In his petition for a Writ of Certiorari and his Memorandum of Law in opposition to respondents' motion

for a preference below, Engelman appears to rely upon the United States Supreme Court's decision in *Lee* v. *Florida, supra.*

Respondents' Memorandum below did not deal with these points for the very good reason that they were not raised in the petitioner's complaint in the United States District Court. A copy of that complaint was attached to the respondents' affidavit in support of this motion for a preference on the appeals calendar of the Court below. A reading of this complaint indicates that it is framed solely on the theory that the use of the wiretaps herein would violate Engelman's *constitutional* rights. There is not one single allegation in the complaint based upon *Lee* v. *Florida* or Section 605 of the Federal Communications Act.

Moreover, even if Engelman had raised the 605 issue, it would not be necessary for the respondents to deal with it in view of the line of authority established in decisions of this Court holding that a federal court should not interfere with State criminal proceedings by enjoining the use of evidence unconstitutionally obtained by search and seizure or illegally obtained by wiretapping (*i.e.*, *Stefanelli* v. *Minard*, 342 U.S. 117; *Pugach* v. *Dollinger*, 365 U.S. 458; *Douglas* v. *City of Jeannette*, 319 U.S. 157; *cf. Dombrowski* v. *Pfister*, 380 U.S. 479).

Both in his petition here and in his Memorandum of Law submitted in opposition to respondents' motion for a preference, Engelman cites the case of *Zwickler* v. *Koota* (389 U.S. 244), although it is unclear as to whether he offers *Zwickler* as authority for his claim that he was entitled to injunctive relief in the United States District Court. In any case, it is clear that *Zwickler* comes within the narrow First Amendment category of exception to the general anti-injunction policy which underlies the *Stefa-*

nelli rule of comity discussed in respondents' original Memorandum of Law. In *Zwickler,* as in *Dombrowski* v. *Pfister,* (380 U.S. 479), also mentioned in petitioner's Memorandum of Law, below, an injunction was sought to prevent a wide-spread suppression of First Amendment rights affected by the threat of prosecution under a statute which, on its face, wrongfully restricted First Amendment liberties and was complained of as overbroad in its reach.

No First Amendment claim is made in this case. The statute alleged by plaintiff to be void, former Section 813-a of the Code of Criminal Procedure, is claimed by petitioner to be violative of the Fourth Amendment to the United States Constitution (enforceable through the Fourteenth Amendment) not the First Amendment. Moreover, Section 813-a, unlike the statute involved in *Zwickler and Dombrowski,* is not the statute under which the prosecution herein is conducted. Section 813-a merely provides rules of procedural law—*i.e.,* it ordains the procedure whereby officials may obtain wiretaps which are usable in evidence in State criminal trials. Section 813-a is not a substantive act defining a crime as were the enactments in *Zwickler* and *Dombrowski.*

Furthermore, in *Zwickler* and *Dombrowski,* unlike this case, the federal court injunction was issued before the District Attorney had actually initiated a criminal proceeding (*i.e.,* prosecution was merely threatened, not pending) and thus a federal court injunction was not barred by the anti-injunction provision of 22 U.S.C. 2283, which prohibits the issuance of a federal court order staying any phase of a pending State judicial proceeding.

Also, in *Zwickler* and *Dombrowski,* unlike this case, a three-judge court had been properly convened in accordance with the requirement of 28 U.S.C. 2281.

Thus *Zwickler* and *Dombrowski* have absolutely no application to the present case, which is controlled by

Stefanelli v. *Minard* and *Cleary* v. *Bolger*, 371 U.S. 392 (involving search and seizure), and *Pugach* v. *Dollinger*, *supra* (involving wiretaps), and the other United States Supreme Court decisions, *supra*, which forbid the granting of a federal court injunction to restrain the presentation at a State criminal trial of unconstitutionally seized evidence or wiretap evidence obtained in violation of Section 605 of the Federal Communications Act.

In his Petition, page 5, and on page 6 of his Memorandum below, petitioner, in seeking to avoid the policy against federal court interference in a State criminal prosecution, argues that he does not seek to enjoin a State criminal prosecution, but simply to enjoin the divulgence of wiretaps in such a prosecution. Even if this were true, petitioner's demand for relief would still be improper in view of the decisions of this Court and the Second Circuit forbidding a federal court from enjoining the divulgence of such evidence in a State court. (See pages 9, 10 and 17 of respondents' original Memorandum of Law discussing these cases and page 3 of their affidavit in support of their motion for preference in the Court below which cites the Second Circuit Court in *Scott* v. *Gagliardi*, 287 Fed. 2d 562, as barring the issuance of a federal injunction against the use of wiretap evidence in a State prosecution.)

It should also be pointed out that the anti-injunction rule of 22 U.S.C. 2283 prohibits not only the enjoining of a prosecution, but also the issuance of a federal court order preventing the taking of any procedural steps in the State Court (see *Hill* v. *Martin*, 296 U.S. 393) such as the procedural step of introducing wiretap evidence.

As a matter of fact, an injunction against the use of wiretap evidence in the State trial would, in fact, amount to an injunction against the conduct of the State prosecution because that prosecution is based upon the wiretap evidence and could not proceed without it, as petitioner concedes in paragraph "11" of his complaint.

Petitioner has stated that his complaint also seeks an injunction against the transmission of the wiretap recordings to the State Liquor Authority, but that does not justify the granting of injunctive relief with respect to the defendants' activities in the State criminal prosecution. In addition, all of the legalistic deficiencies in petitioner's complaint and in his theory of action (discussed in defendants' affidavit and Memorandum of Law below in support of their motion for preference) also operate to preclude the granting of relief to the petitioner with respect to the State Liquor Authority. Furthermore, the federal judicial power may hardly be invoked to control the communications and relations between the respondents and the State Liquor Authority, even assuming, contrary to fact, that this Court could properly prevent the State Liquor Authority from divulging the wiretaps in question at a hearing conducted under its administrative authority.

3. Apart from the foregoing considerations, there is another rule of law which bars the granting of relief to the petitioner in these circumstances. The Second Circuit has recognized that where a plaintiff seeks a federal injunction against a State prosecutor or law enforcement official in order to vindicate alleged constitutional rights, he must show that he has no adequate remedy at law (*Potwora* v. *Dillon*, 386 Fed. 2d 74). The petitioner herein has failed to demonstrate that his remedy in the State courts is inadequate. Indeed, petitioner's complaint herein sets forth no factual allegations demonstrating that the State Judge before whom was pending the motion to suppress the wiretaps would decide that motion incorrectly. Petitioner alleged (on page 8 of his affidavit in opposition to respondents' motion for a preference) that when he advised the County Court Judge of Judge Travia's temporary injunction against the use of wiretaps, the County Court Judge denied petitioner's suppression motion in the State Court with leave to renew. Obviously this denial was based upon the procedural rationale that the granting

of relief in the State Court would have been academic in view of Judge Travia's Order accomplishing the same result. Under the terms of the County Court Judge's decision, petitioner could and did renew his motion to suppress in the State court.

Therefore, even if the wiretap evidence herein were inadmissible in the State proceeding (and respondents do not agree that it is inadmissible), that fact would simply be irrelevant in view of the well settled principles which bar the issuance of federal injunctive relief to prevent the use of such evidence in a State criminal trial or proceeding.

It is true that the 47 U.S.C. 605 issue was raised by Engelman in his belated motion to suppress wiretaps (and renewal thereof) in the County Court of Nassau County. Presumably, Judge Weinstein in the United States District Court adjourned the proceeding before it on the theory that the County Court might suppress the wiretaps on the authority of *Lee* v. *Florida* and *Fuller* v. *Alaska*, thereby making federal relief unnecessary. However, in view of the failure of Engelman's complaint herein to raise the 605 issue, that issue has not been presented for decision in the United States District Court, the Second Circuit or in this Court. Nonetheless, in the final portion of this Brief, Section 605 and *Lee* v. *Florida* are discussed in order to show that they would be of no help to petitioner even if the 605 issue had been properly raised and even if there were no principles barring federal injunctive relief herein.

4. The petitioner contends that the wiretap evidence in this case has been rendered inadmissible by the combined effect of the United States Supreme Court's decisions in *Lee* v. *Florida* (392 U.S. 378) and *Fuller* v. *Alaska* (393 U.S. 80) and that this Court should enjoin its use in State tribunals. It is respectfully submitted that this Court should not give sanction to the petitioner's contention in this regard, even if the granting of federal injunctive relief

were not otherwise barred and even if petitioner had raised this point in his complaint which he did not (his complaint having pleaded only a claim of unconstitutionality).

In *Lee,* this Court, overruling its sixteen year old precedent in *Schwartz* v. *Texas* (344 U.S. 199), decided on June 17, 1968 that evidence obtained through interception of a telephonic communication by listening on an extension telephone, being violative of Section 605 of the Federal Communications Act, was inadmissible in a State criminal trial and that the conviction based upon such evidence must be vacated. In *Fuller* v. *Alaska, supra,* the Court held, on October 28, 1968, that the *Lee* rule of exclusion was not to be applied to State criminal trials occurring before the date of the *Lee* decision. In *Fuller,* Section 605 had been violated by the introduction into evidence at the State trial of a telegram allegedly sent by the defendant to an accomplice.

First, it may be noted that *Fuller* v. *Alaska,* unlike the instant case, dealt with a factual context in which both the evidence-gathering in question *and* the introduction of the evidence at the *trial* occurred before the *Lee* decision was announced. Thus, on a strict legalistic analysis, *Fuller* v. *Alaska* stands for no more than its facts permit it to establish, namely the proposition that, under the particular circumstances of *Fuller,* the *Lee* doctrine will not be applied. *Fuller* does not inaugurate the rule that *Lee* will be enforced retroactively in the situation where the *wiretapping* took place before *Lee* was announced *and the* introduction of wiretap at the *trial* took place after *Lee* was decided.

Indeed, the Court could not have decided this in *Fuller* since the appropriate question was not before it for decision, and if it had approved such a principle therein, which it did not, such formulation would have been mere dictum.

On a purely textual inquiry, it is not a reasonable rendering of the doctrinal thrust of *Fuller* to argue that it

also evinced a purpose to foreclose the issue of retroactivity with respect to factual contexts dissimilar to that involved in *Fuller*.

On the contrary, a conceptual analysis of *Fuller* (which involved revelation of the contents of a telegram in violation of Section 605), clearly demonstrates the impropriety of a retroactive adjudication in this case. In *Fuller*, the Court, in determining the issue of retroactivity with respect to evidence of the telegram, invoked criteria of decision which indicate that it does not favor retroactivity with respect to *wiretap* evidence where law enforcement authorities have relied upon the Court's earlier pronouncements and where a contrary policy would defeat pending prosecutions and exert an unfavorable impact on the administration of justice since wiretap evidence is probative evidence which does not compromise the "fair trial" value.

These criteria—(1) reliance, (2) probativeness, (3) unfavorable impact on the administration of justice—were explicitly approved by the Court in *Fuller* as the governing standards of decision. They suggest the inappropriateness of retroactive enforcement in any situation involving wiretap evidence where official investigatory action has been based upon existing law and where a judicial pronouncement invalidating that action retroactively would defeat pending prosecutions. This impression is reinforced by the portions of the Court's holding stating that retroactive application of *Lee* "is not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose . . ." and that "prospective application of *Lee* is supported by all of the considerations outlined in *Stovall* v. *Denno*, 388 U.S. 293, 297."

The great preponderance of the Court's *Fuller* opinion is devoted to condemning the retroactivity approach. One can only accept the defendant's exegesis of *Fuller* by ignoring the carefully wrought corpus of doctrine which comprises the nucleus of the opinion and concentrating on an

over-literal construction of the last portion of the next to the last sentence of the *Fuller* opinion (discussed presently) divorced from the expressionary setting which defines its meaning.

Such an arbitrary selective focus violates the developmental logic of the *Fuller* opinion. As is clear from the rhetorical structure of that opinion, this concluding phrase is not intended to stand forth by its own unaided force free from all contextual associations, but rather, is designed to apply the general principles exposed in the body of the opinion to the peculiar facts in *Fuller*. The Court, having first declared the undesirability of a retroactive enforcement of *Lee,* then proceeded to indicate in this dispositive phrase that an application of the *Lee* rule in the circumstances of cases such as *Fuller* would constitute such a retroactive adjudication, impliedly since the *Fuller* trial had been concluded before the *Lee* decision was handed down.

Concededly the dispositive phrase could have been conveyed by a more apt and discriminating literary means. However, the unmistakable trend of the *Fuller* opinion as a whole suggests that when the Court opined in its condemnation of retroactivity that:

> "Since this result is not required by the principle upon which Lee was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in Lee."

it really meant to say:

> "We hold that the exclusionary rule is to be applied only to trials in which the evidence was obtained and is sought to be introduced after the date of our decision in Lee."

There is no fatal inconsistency between these formulations. It is simply that the second more effectively sums up the conceptual implications of the *Fuller* holding.

If the dominating substance of the *Fuller* opinion is to be disregarded and *Lee* is to be enforced retroactively in this case, as petitioner Engelman urges, then it would be equally reasonable for respondents to argue that this Court should also ignore the obvious reference to telephonic interception and divulgence in that substance and to regard *Fuller* as contemplating only the telegram situation and as creating a limited and idiosyncratic rule confined to telegram communications. From this premise a whole ideology of non-exclusion could be developed. It could be argued that even if the Court had intended to impose a rule of exclusion regarding divulgence of the contents of a telegram, which is a rare and unusual method of proof in State criminal cases, it certainly cannot be inferred from this that it favored the same rule with respect to wiretap evidence which is used so much more frequently than proof of contents of telegraphic communications. The application of the rule of exclusion to telegrams would have little impact on the administration of justice. In the case of wiretaps, on which so many pending prosecutions throughout the country depend, the invocation of the *Lee* rule retroactively would have a substantial unfavorable impact on the administration of justice.

With respect to all such evidence-gathering by electronic surveillance, this Court clearly intended that retroactive adjudication be avoided, as it plainly reveals in its opinion in the recent *Desist* case, *supra,* discussed later in this brief. The language of *Desist* clearly exhibits the Court's intention that *Desist* should lay down the rule controlling all types of electronic eavesdropping. In both the *Desist* case, involving non-trespassory bugging, and the *Kaiser* case, *supra,* involving non-trespassory electronic eavesdropping by wiretapping, Fourth Amendment questions were raised.

The telegram in *Fuller* did not raise Fourth Amendment questions and evidence as to its contents was not obtained by electronic eavesdropping.

It follows that even if the doctrinal essence of *Fuller* was correctly rendered in petitioner's contention, and it is not, that would not foreclose the retroactivity issue in this context.

The fact of the matter is that the Supreme Court never intended that *Fuller* v. *Alaska* should be employed in situations such as this case to justify retroactive application of *Lee* v. *Florida.*

From the observations made of this Court's demeanor at the argument of the *Kaiser* case, the author is convinced that the Supreme Court was surprised when District Attorney Cahn, arguing the case of *Kaiser* v. *New York* in January, 1969, pointed out to the Court that some persons were attempting to use *Fuller* v. *Alaska*, decided in October, 1968, in order to bar from State trials wiretap evidence obtained prior to the date of the Court's decision of June 17, 1968, in *Lee* v. *Florida.* It seemed obvious to the author from the Court's reaction at the argument of *Kaiser* that it was surprised because it only meant to declare in *Fuller* that the *Lee* holding did not apply in the circumstances of *Fuller, i.e.,* where the trial had occurred before the *Lee* decision. (See the excerpts from the argument of the *Kaiser* case in the Supreme Court annexed to this brief, as Exhibit A.)

It will violate the avowed inuitions of policy which inform the Court's decision in *Fuller,* if that decision be viewed as authority for the position that the *Lee* rule of exclusion should operate with retroactive effect in a situation, such as this, where there has been similar reliance by law enforcement on the Court's earlier decisions, where the evidence is similarly probative, and where retroactive enforcement would similarly defeat pending prosecutions.

That retroactive enforcement would have a seriously unfavorable impact on law enforcement may be gathered from the New York Court of Appeals finding in the *Kaiser* case, *infra*, that "thousands of eavesdropping orders have been issued in reliance upon the statute and the decisions of this Court which the Supreme Court has seen fit not to disturb. . . ."

Although it would be an extremely burdensome task if this office were to attempt to review the files in each of the multiplicity of cases presently awaiting prosecution, the intelligence now available indicates that there are, as a minimum, approximately 100 cases involving such wiretap evidence awaiting trial in the District Court and County Court of Nassau County. Virtually all of these prosecutions must be discontinued if the wiretap evidence is ruled inadmissible.

Where the method of investigating the crime in question—*i.e.*, wiretapping—and the evidentary strategy of the prosecution were decided upon before the *Lee* doctrine was pronounced, they were necessarily based on the law as it then existed. To hold such investigatory and evidentiary means invalid in retrospect would be to elevate an irrationality to the status of a constitutional principle because it would decree in effect that official authority shall be penalized years after the event for conforming its actions to the law as it then existed. In thus ordaining clairvoyance as an imperative of constitutional law, such a holding would, for no sound practical reason and without serving any weighty social interest, impose upon law enforcement authorities the obligation of predicting the precise shape of future Supreme Court decisions years before those decisions had even been conceived by the justices who later articulated them.

If the investigatory authorities in this case had been forewarned of the later emergence of such new principles at the time when they developed the evidentiary case

against the defendant in question, they would have had the opportunity to dispense with wiretap evidence and to pursue other avenues of inquiry and evidence-gathering. Since they did not possess the gift of prophecy, that opportunity was not open to them. Thus the practical effect of enforcing *Lee* retroactively in circumstances such as these is that all police investigatory activities, no matter how impeccable when conducted, are subject to be defeated by later expressions of the Supreme Court's evolving procedural imagination, however unforeseeable such expressions may have been at the time of investigation.

If the *Fuller* decision should be read as requiring that the *Lee* doctrine be applied to wiretaps conducted before *Lee*, it would rule out the use of indispensable wiretap evidence in prosecutions in this office and throughout the State —some involving major felonies—which are dependent on wiretaps obtained years before the *Lee* decision. Furthermore, it might doom to failure other prosecutions in which vital evidence other than wiretaps was obtained through leads disclosed in wiretaps of a defendant's telephone conversation or telephone and may thus be subject to exclusion under the "fruit of the poisonous tree" doctrine first propounded in *Silverthorne Lumber Co.* v. *United States* (251 U.S. 385).

In many of these prosecutions, so much time had gone by between the date of the wiretap and the date of the *Lee* decision that it would have been difficult or impossible, at the later date, to develop other evidence not obtained from wiretaps and not traceable to it as "fruits". This is especially so in gambling cases.

The effect of such a rule of retroactivity would be that many major felony prosecutions would be dismissed and dangerous criminals permitted to walk the streets even though the wiretap evidence developed against them was probative and clearly proved their guilt and even though such a result was not justified by any countervailing neces-

sity of public policy and did not serve any more paramount social interest. (The New York Court of Appeals held in *People* v. *Kaiser*, 21 N.Y. 2d 86, that retroactive application would have no value as a *deterrent* to illegal police conduct, a conclusion apparently approved by this Court in view of its affirmance in *Kaiser, supra*. Even if the Court of Appeals was wrong in its conclusion as to the Fourth Amendment, it would be right as to Section 605 of the Federal Communications Act; since that section no longer exists, there is no question of deterring future violations of it.)

That the rationale of *Fuller* confirms the principle here contended for by respondents, may be gathered from the language in that decision holding that retroactive application of *Lee* "... is not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose ...". In view of this unqualified assertion that retroactivity is not necessary, there would seem to be no reason why even a limited retroactivity should be enforced by decreeing that the *Lee* doctrine shall be implemented with respect to situations where wiretap evidence obtained before the *Lee* decision was introduced in trials occurring after the date of the *Lee* decision.

It is submitted that the appropriate principle for the governance of situations such as that here presented was propounded in *Stovall* v. *Denno*, 388 U.S. 293, where this Court held that retroactivity will not be enforced in those circumstances where the evidence-gathering occurred before the date of the decision sought to be invoked retroactively by the defendant. That this view is sound is attested by the explicit statement of the Court in *Fuller* that "prospective application of *Lee* is supported by all of the considerations outlined in *Stovall* v. *Denno, supra*, at 297".

In developing a case against the petitioner based upon wiretap evidence, the People relied upon the assurance

given it by the Supreme Court in 1952 in *Schwartz* v. *Texas* (344 U.S. 199) that such wiretap evidence was admissible in state criminal trials. That such reliance was proper was expressly stated by the Supreme Court in *Fuller* v. *Alaska* when it held in part that ". . . the States have justifiably relied upon the explicit holding of *Schwartz* that such evidence was admissible". The Supreme Court further noted, with obvious disapproval that "retroactive application of *Lee* would overturn every State conviction obtained in good-faith reliance on *Schwartz.*"

Developments occurring since the announcement of the *Fuller* decision confirm the analysis here urged by respondents.

The District Attorney of Nassau County recently argued, on behalf of the State of New York, the case of *Kaiser* v. *The State of New York, supra,* in this Court. In the course of his argument, he asked the Court to make clear in its *Kaiser* decision that the rule of *Fuller* v. *Alaska* did not initiate the principle that the *Lee* v. *Florida* rule would be applied retroactively in cases where the wiretapping occurred before the *Lee* decision and the wiretap evidence was introduced at a criminal trial after the date of the *Lee* decision.

Some of the justices, notably Mr. Justice Brennan, indicated a reluctance to make such a pronouncement in the *Kaiser* case on the ground that, since the Kaiser wiretap *and* trial *both* occurred *before Lee,* such a pronouncement was unnecessary to the decision in *Kaiser* and would constitute mere dictum. However, Mr. Justice Brennan indicated that the District Attorney should not assume that State judges would dismiss prosecutions by invoking the *Lee* doctrine retroactively, and, if they did, the District Attorney could seek a ruling to the contrary from the United States Supreme Court by appealing Orders of suppression rendered on pre-trial wiretap motions in accordance with the appellate procedure set out in Section

518 of the New York Code of Criminal Procedure. It was Justice Brennan's view (and, in this regard, it was clear from the deportment of the other Justices and the atmosphere of the Court at this point in the argument that other members of the Court were of similar mind) that, in such circumstances, such an appeal to the United States Supreme Court would not be subject to the objection that it called upon the Supreme Court to promulgate a statement of principle which was nothing more than dictum. (See excerpts from *Kaiser* argument in Appendix B at end of this brief.)

It was obvious from Mr. Justice Brennan's remarks that the *Kaiser* case could and would be decided by a mere affirmation of the language and holding in *Fuller* v. *Alaska* since, in both *Fuller* and *Kaiser*, the wiretapping *and* the trial occurred *before* the date of the *Lee* decision and thus no further determination was required from the Court in *Kaiser*. Thus *Kaiser* no more establishes a rule governing the different factual context involved in this case than did *Fuller* v. *Alaska*.

It is respectfully submitted that, in the absence of a clear statement of this Court to the contrary, this Court should approve the rule of public policy mandated by the New York Court of Appeals in *People* v. *Morhouse* (21 N.Y. 2d 66). In that decision, the Court of Appeals said at page 77:

> "The prosecution's conduct in obtaining and carrying out these eavesdrop orders, and the orders themselves, are to be tested only against the standards reasonably believed applicable at the time such orders were obtained and this conduct occurred. (Cf. *Stovall* v. *Denna, supra,* pp. 296-297.)"

The *Kaiser* decision, *supra,* was recently handed down by the United States Supreme Court (on March 24, 1969) at the same time that the Court published its decision in the companion case of *Desist* v. *United States, supra.* In

Desist, this Court held that its *Katz, supra,* decision applying the Fourth Amendment's warrant provisions to non-trespassory eavesdrops should be enforced only prospectively and that it should not be applied to cases in which *the electronic surveillance* in question *occurred before* the date of the *Katz* decision. In other words, *Desist* held that, with respect to the *Fourth Amendment* principles governing electronic eavesdropping, the *Stovall* rule of total prospectivity should apply. Most wiretapping, including the wiretap herein, is non-trespassory.

That respondent's contention in this regard is well taken, may be gathered from a realization of the state of legal affairs which would exist if the contrary view were accepted.

If petitioner Engelman's argument be accepted herein, it would follow that the Section 605 questions concerning electronic surveillance should be decided by a different and a more protective principle than that enforced with respect to Fourth Amendment questions—one ordaining retroactivity rather than prospectivity—thus ensuring that Fourth Amendment rights would be less esteemed and less fully protected than Section 605 rights.

The implications of the approach urged by petitioner, Engelman, would be that defendants charged or convicted on the basis of wiretap evidence of the type here involved could not obtain relief by recourse to the Fourth Amendment. If they cited the Fourth Amendment alone, they would be doomed to incarceration, perhaps for years, whereas if they cited Section 605 as the ground for relief they would win freedom. And defendants prosecuted on the basis of non-trespassory electronic eavesdrops not obtained by wiretapping would similarly be subject to the full penalty of the law since Section 605 is not applicable to such eavesdropping.

There would appear to be no sound reason why two defendants equally guilty should be treated in such different fashion simply because one was charged or convicted by use of wiretap evidence and the other by use of electronic eavesdropping not involving the tapping of a telephone wire.

This Court can hardly intend that such a grotesque condition of affairs should pertain. Its clear expressions of intent in *Fuller* v. *Alaska* (previously discussed) point in the opposite direction as do its conceptions of policy reflected in the language of *Desist*.

In *Desist*, this Court held in part, at pages 6-7 of its printed opinion, (22 L. Ed. 2d 255-6) that ". . . We recently held in *Fuller* v. *Alaska*, 393 U.S. 80, that the exclusionary rule of *Lee* v. *Florida*, 392 U.S. 378, should be accorded only prospective application. Analogizing *Lee to Mapp*, we concluded that evidence seized in violation of Section 605 of the Federal Communications Act was 'no less relevant and reliable than that seized in violation of the Fourth Amendment' and that both decisions were merely 'designed to enforce the federal law' 393 U.S. 80".

This language in *Desist* makes it clear that the Court did not regard *Desist* and *Fuller* as expressing different principles. The quoted language also exhibits the Court's view that, with respect to the question of retroactivity, Fourth Amendment rights and Section 605 rights shall be equated or analogized and dealt with by the same approach.

If respondent's contention in this regard be rejected, it would follow not only that Section 605 rights have a more exalted status than constitutional rights, but, more, that Section 605 should be enforced after the repeal of its telephonic interception provision on June 19, 1968 (two days *after* the *Lee* decision) in Section 803 of the Omnibus Crime Control and Safe Streets Act of 1968, in such a manner as to accord defendant-telephone communicants greater rights

than 605 was held to provide them during the 34 years when it was in effect.

In its recent *Desist* decision, this Court has expounded with force and clarity the considerations which it regards as determinative with respect to the issue of retroactivity in electronic eavesdrop cases. Its decisional logic in *Desist* demonstrates that the conceptions of policy which it regards as controlling apply equally to all forms of electronic eavesdropping including wiretapping. It is plain from the Court's explication in *Desist* of the conceptual basis of its retroactivity jurisprudence that the petitioner Engelman's claim that wiretapping should be handled differently from other forms of eavesdropping so far as retroactivity is concerned is totally inconsistent with the theoretical underpinning of the Court's well-defined standpoint.

The following quotations from the decision in *Desist*, would seem to dispose of petitioner's contention:

> "The second and third factors—reliance of law enforcement officials, and the burden on the administration of justice that would flow from a retroactive application—also militate in favor of applying *Katz* prospectively. . . ."
>
> "Because the deterrent purpose of *Katz* overwhelmingly supports nonretroactivity, we would reach that result even if relatively few convictions would be set aside by its retroactive application. . . ." (22 L. Ed. 2d at 256)
>
> "*Both* the *deterrent purpose* of the exclusionary rule and the *reliance* of law enforcement officers *focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date.* Exclusion of electronic *eavesdropping evidence seized before Katz* would increase the burden on the administration of justice, would overturn convictions based on fair reliance upon pre-*Katz* decisions, and would not serve to deter similar searches and seizures in the future. . . ." (22 L. Ed. 2d at 257)

> "In sum, we hold that *Katz* is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967. *Since the eavesdropping in this case occurred before that date* and was consistent with pre-*Katz* decisions of this Court, the convictions must be Affirmed." (*supra,* at 258) (emphasis supplied).

and at Note 24:

> ". . . we simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served. The exclusionary rule 'has no bearing on guilt' or 'the fairness of the trial.' " (*supra,* at 258)

5. Even if it be assumed, *arguendo,* and contrary to fact, that the respondents are mistaken in their contention that the reigning principles of retroactivity do not bar the admission in evidence of the wiretaps in question, the principle of statutory abatement legitimizes the introduction of the wiretap evidence in this case since the telephonic interception provision of Section 605 was repealed on June 19, 1968, and thus does not operate as a bar to the divulgence of wiretaps in the trial of this case.

The respondents' contention in this regard is simply that Section 605 of the Federal Communications Act is not available to Engelman and to criminal defendants similarly situated, as the basis for an objection to the introduction of wiretap evidence since the portion of Section 605 dealing with telephonic interceptions is no longer in force, having been repealed on June 19, 1968, two days after the *Lee* decision, by the enactment in Congress of the Omnibus Crime Control and Safe Streets Act (Chapter 119 of Part I of Title 18, U.S. Code; 82 Stat. 212-225; Public Law 90-351) and particularly Section 803 of that Act.

The former portion of 605 which provided that "No person not being authorized by the sender shall intercept any communication and divulge . . . the existence, contents

. . ." has been amended so as to provide "No person not being authorized by the sender shall intercept any *radio* communication and divulge . . ." (emphasis supplied). By inserting the word "radio" before the word "communication", Section 803, enacted on June 19, 1968, restricted the regulatory effect of this provision against interceptions to the interception of radio communications and, thus eliminated, *i.e.*, repealed, the prohibition against the interception of telephonic communications formerly contained in Section 605. The general prohibition against the interception and the consequent divulgence of telephonic communications is now contained in the new Section 2511 of Chapter 119 of Title 18 of the United States Code enacted on June 19, 1968, in Section 802 of the said Safe Streets Act. Wiretapping and disclosure of wiretap evidence by State law enforcement officers is permitted in Section 2516 of the Act.

However, the provisions concerning telephonic interceptions in the new Omnibus Crime Control Act are not to be given retroactive effect. In *United States* v. *American Radiator and Standard Sanitation Corporation*, decided August 27, 1968, the Federal District Court for the Western District of Pennsylvania, held that Section 2515 providing for the inadmissibility of evidence obtained in violation of the provisions of the new Omnibus Crime Control Act would not bar the admission of wiretap evidence seized prior to its enactment, but used on a trial after the passage date of Title III, the portion of the new act dealing with wiretaps. 37 LW 2119. See also L. 1968, ch. 546, Section 6.

Under the statutory abatement doctrine propounded by this Court in *Hamm* v. *Rock Hill* (379 U.S. 306), 605's prohibition against telephonic interceptions having been repealed, this provision abated and can not be validly invoked as a ground for relief.

The rule articulated by the Court in *Hamm* is consistent with the long established practice of the common law. Its

application in wiretap cases will have the sanction of practical reason as well as historic acceptance. For 34 years, it was the policy of the federal government and all of its agencies, judicial, legislative and executive, not to treat State wiretapping as violative of federal public policy.

The Congress of the United States, aware of the use of such evidence in State tribunals, refused to enact a law prohibiting such use. This Court similarly refused to adopt a rule of exclusion with respect to such evidence. (See *Schwartz* v. *Texas*, 344 U.S. 199; see also Brooklyn Law Review, Winter 1968, page 243.) The United States Department of Justice and all United States Attorneys refused to prosecute State officials under the Federal Communications Act for wiretapping and the use of wiretap evidence, and a federal court in New York State refused to issue warrants for the arrest of State officials using wiretap evidence (in *Pugach* v. *Klein*, 193 F. Supp. 630, 641, SDNY, 1961).

The United States Department of Justice and the F.B.I. took the official position that 605 was not violated by wiretapping alone and that both tapping and divulgence were necessary to bring the statute into operation. They defined "divulgence" as publication outside of the governmental realm thus viewing as exempt from the bar of the statute all divulgence among cooperating law enforcement officers. (See Brownell, The Public Security and Wiretapping, 39 Cornell, L.Q. 195, 197-199, 1954; Rogers, The Case for Wiretapping, 63 Yale L.J. 792-3, 1954; Katzenbach, 32 FRD 107; Hoover, 58 Yale L.J. 422, 1949.)

In *Benanti* v. *United States*, the Supreme Court left open the question as to the validity of this view that 605 was not violated unless both interception and divulgence outside official circles had occurred. (See *Benanti* v. *United States*, 355 U.S. 96, 102, n. 10.)

Section 605 (47 USC 605) provided in part:

> "No person not being authorized by the sender shall intercept any communication *and* divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

The Department of Justice's interpretation of 605 is in accord with the objective meaning of 605's language since the draftsmen of 605, in formulating the conditions *of* wrongdoing, framed its prohibitory criteria in the conjunctive.

Moreover, violation of Section 605 is made criminally actionable by the provisions of Section 501 of the Federal Communications Act. Thus 605 should not be construed as imposing any greater dimension of criminal liability than its terms clearly and expressly decree in view of the settled principle that a statute used as a basis of criminal punishment must be strictly construed (e.g., see *People* v. *Nelson*, 153 N.Y. 90), or, at the very least, *narrowly* construed, even where the statutes of the jurisdiction in question expressly forbid *strict construction* (see: *Hornstein* v. *Paramount Pictures, Inc.*, 292 N.Y. 468, 470; *People* v. *Shakun*, 251 N.Y. 107).

The adjudicated cases indicate that under either regime of construction, penal statutes may not be interpreted broadly so as to increase the scope of liability beyond the point clearly provided in the enacting language.

CONCLUSION

For all the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: Mineola, New York
March 6, 1970

APPENDIX A

Opinion of United States Court of Appeals for the Second Circuit

FRIENDLY, *Circuit Judge*:

This action, in which federal jurisdiction was asserted under the jurisdictional implementation, 28 U.S.C. § 1343 (3), of the Civil Rights Act, 42 U.S.C. § 1983, was brought in the District Court for the Eastern District of New York in February 1968. The complaint alleged that on January 26, 1968, Detective DePaola, one of the defendants here, filed a two count information and complaint in the District Court of Nassau County, New York, charging Engelman and another with conspiring to violate and with substantively violating former § 986 of the New York Penal Law relating to bookmaking. The state court complaint averred that the source of the detective's knowledge and the basis of his belief were "telephone conversations of the defendants monitored by the complainant pursuant to wire tap order of the County Court, Hon. Albert Oppido, dated April 17, 1967, wherein the complainant heard the defendants commit the aforesaid acts." Alleging that such wiretapping violated his rights under the Fourth and Fourteenth Amendments, Engelman sought declaratory and injunctive relief with respect to the use of the wiretapped conversations in the pending criminal prosecution or before any other court as well as an order directing all tapes or transcripts of the conversations to be surrendered to him or destroyed.

A flurry of papers followed. Plaintiff moved for a temporary injunction; he said something about convening a three-judge court to enjoin the enforcement of § 813-a as unconstitutional but apparently the motion was not pressed. The defendants cross-moved to dismiss the complaint. After several adjournments both motions were

argued before Judge Weinstein on June 26, 1968. By that time the Supreme Court had decided *Lee* v. *Florida,* 392 U.S. 378 (1968), overruling *Schwartz* v. *Texas,* 344 U.S. 199 (1952), and holding that wiretap evidence obtained and divulged in violation of former § 605 of the Federal Communications Act, 47 U.S.C. § 605 (1964 ed.), is inadmissible in state criminal prosecutions. Since then the plaintiff, who had earlier disavowed any reliance on § 605, appears to have considered it to be the heart of his case, while the defendants, who had earlier spent considerable time arguing the inapplicability of the section, have emphasized that it was not mentioned in the complaint and that the complaint has never been amended to refer to it.[1] Something seems to have been said about Engelman's holding some kind of license from the State Liquor Authority and the effect thereon of the wiretap evidence of gambling, see N. Y. Alcoholic Beverage Control Law, § 118, and everyone appears to have considered this as part of the case although no one bothered to amend the complaint to state it. Noting an indication by the District Attorney "that he has no intention to use the wiretap evidence" in the criminal prosecution and a representation that the evidence would not be furnished to the Liquor Authority pending the decision in *Kaiser* v. *New York, cert. granted,* 390 U.S. 1023 (1968), which the judge thought would probably determine the retroactive effect of *Lee,* the court denied both motions without prejudice to their renewal.

The Supreme Court found occasion to speak to the retroactivity of *Lee* even before it decided *Kaiser.* Addressing itself to a pre-*Lee* trial, it said in *Fuller* v. *Alaska,*

[1] The papers below made no reference to the drastic changes in the federal wiretap law affected by the Omnibus Crime Control and Safe Streets Act, 82 Stat. 212, enacted on June 19, 1968. In light of the disposition we make of this case we express no views concerning their effect on antecedent wiretaps except to say that this is not free from doubt.

393 U.S. 80 (1968), that "the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee*." On March 24, 1969, in *Desist* v. *United States*, 394 U.S. 244, the Court announced that *Katz* v. *United States*, 394 U.S. 244 (1969), 389 U.S. 347 (1967), which overruled the doctrine that only trespassory eavesdrops or intrusions into constitutionally protected areas could rise to the level of unconstitutional searches and seizures, would be given "wholly prospective application," 394 U.S. at 246, to wit, "only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967." 394 U.S. at 254. The same day the Court decided *Kaiser* v. *New York*, 394 U.S. 280 (1969), and held that neither *Lee* nor *Katz* required overturning a conviction resting on wiretap evidence obtained pursuant to an order under § 813-a where the wiretap was nontrespassory (as apparently was the case here) and occurred prior to the date of *Katz* and the wiretap evidence was introduced prior to the date of *Lee*.

Meanwhile Engelman had renewed a motion to suppress in the state court, which had previously been denied. Although the new motion was made before *Fuller*, *Kaiser* and *Desist*, argument was postponed until after these cases were decided, and the court then reserved decision.[2] A fortnight later plaintiff renewed his motion for a temporary injunction in the federal suit, contending among other things that the danger of prejudice before the Liquor Authority required the injunction regardless of what the state criminal court might decide on the motion to suppress on the bookmaking charge. After the defendants had obtained a three week adjournment, the motion came on before Judge Travia on May 28, 1969. The docket entry

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[2] Although the state judge ultimately denied the motion to suppress without prejudice to its renewal, this was because he thought the federal injunction subsequently entered had rendered the issue academic.

recites "No opposition—Motion granted. Submit order on notice." On June 11 the court entered an order enjoining defendants *pendente lite* from offering any wiretapped conversations monitored or recorded pursuant to the order under § 813-a "as evidence or proof, or for any other purpose in any action or proceeding before any court, person, or any administrative agency, or in any manner whatever."

Defendants promptly appealed to this court. On August 6, 1969, they obtained an order granting a preference and dispensing with briefs on appeal but directing that an appendix be filed within 20 days. Their sense of urgency then declined. The appendix was not filed until September 29, and the appeal was not brought on for argument until November 7. Meanwhile—and since—we have been subject to a deluge of affidavits and memoranda from the district attorney. The experience demonstrates the undesirability of granting dispensation from the simple provisions of the Federal Rules of Appellate Procedure save on the strongest showing of need.

The first question encountered is whether the injunction was in fact granted in the absence of opposition. Being unable to resolve this on the record, we requested the parties to furnish affidavits as to what occurred in the district court on May 28. While no one appeared there for the District Attorney, a Deputy County Attorney who was in court on another matter made known that the deputy in charge was engaged elsewhere. According to his affidavit, he requested an adjournment but was told by the judge there was no point in this in view of the *Lee*, *Fuller* and *Kaiser* decisions. The deputy says he stated he could not consent to the granting of the motion but had no papers to present. In light of this, and of the defendants' consistent history of opposing everything, we cannot think the motion was consented to except in the narrow sense that no one was on hand to speak against it that day. We therefore proceed to the merits.

Appendix A

The portion of the injunction relating to the use of evidence obtained by wiretapping in the state criminal proceeding would seem to fly in the face of *Stefanelli* v. *Minard*, 342 U.S. 117 (1951), which was followed in *Pugach* v. *Dollinger*, 365 U.S. 458 (1961), unless that decision is inapplicable when admission of the evidence would require reversal and unless such was the case here. The argument for such a view would be that *Stefanelli* and *Pugach* were designed simply to protect the doctrines of *Wolf* v. *Colorado*, 338 U.S. 25 (1948), and *Schwartz* v. *Texas*, 344 U.S. 199 (1952), from backdoor attacks, but that the situation differs now that *Wolf* and *Schwartz* have been overruled.

We do not read *Stefanelli* as thus limited. See *Cleary* v. *Bolger*, 371 U.S. 392 (1963). Indeed it was the very inability of the petitioners in that case to protect their interests in the ordinary course of defense at trial and subsequent appeal that gave their position such limited plausibility as it had. See 342 U.S. at 119-20. The holding was "that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure." 342 U.S. at 120. Mr. Justice Frankfurter spoke eloquently of "perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States." *Id.* He mentioned that "the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its on law, has been an historic concern of congressional enactment," *id.*, citing the anti-injunction statute, 28 U.S.C. § 2283. The Court also noted that to sanction any such intervention as was proposed "would invite a flanking movement against the system of State courts by resort to the federal forum . . . , which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts," 342 U.S. at 123-24.

We are well aware of decisions, as far back as *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908), *and Bacon* v. *Rutland R.R.*, 232 U.S. 134 (1914), holding that although exhaustion of state administrative remedies is normally required, exhaustion of state judicial remedies is not. Even apart from the effect of 28 U.S.C. § 2283, statements of the latter sort still leave intact, as we noted in *Potwora* v. *Dillon*, 386 F.2d 74, 77 (2 Cir. 1967), the historic rule, embodied in § 16 of the First Judiciary Act, 1 Stat. 82 (1789), and later in Rev. Stat. § 723 and 28 U.S.C. § 384 (1940 ed.), that suits in equity shall not be sustained in courts of the United States "in any case where a plain, adequate and complete remedy may be had at law." The Supreme Court has affirmed the general applicability of this principle when the remedy at law is a motion to suppress or an objection in a state criminal prosecution both in *Cleary* v. *Bolger, supra,* 371 U.S. at 400-01, and in *Dombrowski* v. *Pfister,* 380 U.S. 479, 484-85 (1965). Indeed the Court there stated:

> "It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment," 380 U.S. at 485, n. 3 (1965).

We see no reason to think this is such a case.

We find no sufficient basis for reaching a different conclusion concerning the propriety of the portion of the order which enjoined the defendants from communicating evidence obtained by the wiretaps to the State Liquor Authority. The New York Court of Appeals has recently held the exclusionary rules to be fully applicable in proceedings before that agency, *Finn's Liquor Shop* v. *State Liquor Authority,* 24 N.Y.2d 647, 301 N.Y.S.2d 584 (1969), and there is thus no ground for belief that any testimony resulting from wiretaps subsequent to December 18, 1967, or

inadmissible as a consequence of a federal statute, will be there received. It is true that the anti-injunction statute, 28 U.S.C. § 2283, is inapplicable since it relates only to *pending* state *court* proceedings. But, as we have pointed out, although *Stefanelli* relied in part on 28 U.S.C. § 2283, it rested on larger principles of equity and federalism, which the Court has again recognized in the passages we have cited from *Dombrowski*. We also note that the injunction which the Supreme Court directed to be reversed in *Cleary* v. *Bolger*, *supra*, 371 U.S. at 395, included the use of evidence at an administrative proceeding before the Waterfront Commission.

Defendants have requested that we not merely reverse the temporary injunction but also direct dismissal of the complaint. Since our review has disclosed the lack of equity in the bill, that is the appropriate course.[3] See *Metropolitan Water Co.* v. *Kaw Valley Drainage District*, 223 U.S. 519, 523 (1912); *Triumph Hosiery Mills, Inc.* v. *Triumph Int'l Corp.*, 308 F.2d 196, 200 (2 Cir. 1962); *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 952 (1969).

The temporary injunction is vacated and the cause remanded with instructions to dismiss the complaint. In view of appellants' disregard of the terms of the order with respect to their expedited appeal, we deny costs.

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[3] That plaintiff sought declaratory as well as injunctive relief is no bar to this result. *Zwickler* v. *Koota*, 389 U.S. 241 (1967), where the Supreme Court distinguished between the two types of relief for purposes of the abstention doctrine, is not in point. This is not a case in which the federal court is asked to withhold relief in the hope that the state courts will narrowly construe a statute and thus render it impervious to constitutional attack. Rather, the denial of federal relief rests on the desire to avoid unnecessary friction between state and federal courts and piecemeal litigation of criminal cases. Declaratory judgments can be as dangerous as injunctions in that respect.

APPENDIX B

Excerpts from the argument on January 16, 1969, of District Attorney William Cahn in behalf of respondent in the United States Supreme Court in the case of *Thomas R. Kaiser* v. *The People of the State of New York.*

ON PAGE 20 OF THE MINUTES OF ARGUMENT:

". . . We relied on 34 years of experience at that particular time where Federal authorities would not impose the provisions of Section 605. We suddenly were faced with Lee and the application of Fuller. What I am asking this Court to consider now in view of the case of Hamm versus Rock Hill which in my opinion and from that particular—

Q. Excuse me. You have already said that Lee and Florida was not retroactive? A. Correct, sir.

Q. Well, what are you asking us to do, to reconsider for? . . ."

ON PAGE 21 OF THE MINUTES OF ARGUMENT:

"Q. I don't understand. Didn't we say—you quote in your brief—maybe I had better get it—prospective application of Lee supported by all the consideration as outlined in Stovall. And yet you say we didn't apply the Stovall Doctrine? A. That is correct, sir. . . ."

ON PAGE 24 OF THE MINUTES OF ARGUMENT (AND CONTINUED TO PAGE 25):

"Q. You still face the difficulty under 605 of prohibition. That is prohibition against use.

Is that right? A. Yes.

Q. For that then to prevail we have got to modify our holding in Fuller, is that it? A. No. I am asking that this Court modify the holding in Fuller but holding Fuller would be sufficient to have this case sustained because—

Q. What do you mean by holding? Oh, because the trial was before Lee in Florida? A. Yes, that is correct, sir.

Q. Well, then why are you asking us to modify Fuller then? Because of some other cases? A. Because of public interest.

Q. Of some other cases? A. Absolutely.

Q. Oh, heavens, don't we have enough to do to decide here without deciding all the rest of your cases for you? A. In this particular decision and in reference—

Q. No, but seriously, Mr. Cahn, if you can prevail under Fuller, if you prevail on the Fourth Amendment point, I honestly don't see why you should ask us now to review again what we held before. . . ."

ON PAGE 25 OF THE MINUTES OF ARGUMENT:

"A. That is correct. There is no 605 because of the doctrine enunciated in Hamm versus Rock Hill. And again I don't think that—

Q. We don't have to reach that in this case? A. Pardon?

Q. We certainly don't have to reach that in this case. That is some other case you are going to bring up here next year or in the spring? A. If it is not reached in these cases, those cases where wiretaps were used in cases involving organized crime, where court orders were obtained, and where delays—

Q. You mean they won't be tried? A. That is correct, sir.

(Continued on Page 26)

Q. Well, they will be if you have any confidence in the argument you are just making to us on the Hamm versus Rock Hill. . . ."

ON PAGE 26 OF THE MINUTES OF ARGUMENT:

"Q. Can't you appeal in your state on a motion to suppress or sustain, can't you appeal? . . ."

Appendix B

ON PAGES 26 AND 27 OF THE MINUTES OF ARGUMENT:

"Q. Yes, but Fuller didn't consider whether the Safe Streets Act would have an impact on the 605 cases. A. I see why Mr. Justice White is suggesting that we bring the Rock Hill argument before the lower court and

Q. Why not? A. And ask them in effect to overrule—

Q. Not overrule. You just have the court rule on what the impact of the new Federal law is. A. If that be true, I think there are approximately 20 cases involved and I feel that—

Q. Well, what would you do? Would you not try these cases just on account of Fuller if Section 605 had been repealed last month? Just outright repealed? A. We would still be faced with the question before our lower court, Mr. Justice White.

Q. I know it, but I would suppose you would at least raise an argument. . . ."

ON PAGE 28 OF THE MINUTES OF ARGUMENT:

"Q. You want to extend Fuller on a hypothetical case, on these 20? A. The extension of Fuller I don't believe can be classified as hypothetical.

Q. I am talking about this case. Am I right that we can decide this without touching Fuller? A. Yes.

Q. Why touch it? . . ."

ON PAGE 29 OF THE MINUTES OF ARGUMENT:

"Q. Tell me, Mr. Cahn, was 605 expressly repealed in the Safe Streets Act? I don't know. A. I would say so . . ."

ON PAGE 30 OF THE MINUTES OF ARGUMENT:

"Q. You can just rely on Fuller against Alaska to win as far as 605 is concerned. A. Yes . . ."

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1183

ISIDORE ENGELMAN,

Petitioner,

against

WILLIAM CAHN, as District Attorney of the County of Nassau, State of New York, and others,

Respondents.

PETITIONER'S REPLY BRIEF

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ABRAHAM ENGELMAN,
of Counsel.

IN THE

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OCTOBER TERM, 1969

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ISIDORE ENGELMAN,

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Respondents.

PETITIONER'S REPLY BRIEF

Defendants dismiss our contention that *Zwickler* v. *Koota*, 389 U. S. 244, mandates the acceptance of jurisdiction on any federal question, constitutional or otherwise. They argue that the principle enunciated in *Zwickler* is to be given only limited application, namely, to First Amendment claims. This is, of course, a complete distortion of the teachings of the case (p. 6, pet.).

Also according to the respondents, we are to be denied relief because: "There is not a single allegation in the complained based upon *Lee* v. *Florida* or Section 605 of the Federal Communications Act" (p. 6, res. brief). It is submitted that neither statutes nor precedents need be alleged in a pleading. As a matter of common knowledge, allegations of law are generally considered bad pleading. The fact is that the complaint does allege that the wiretaps

were "illegally obtained" (¶s 18, 19 & 20). This indeed is more than sufficient to allege a violation of existing federal law. Moreover, assuming *arguendo,* such allegations of precise statutes are necessary to constitute good pleading, dismissal without leave to amend is rather inequitable.

Finally, defendants argue that on the question of retroactivity, Sec. 605 questions should not be given a more favored basis than constitutional questions. We are not concerned in this matter with constitutional violations. Here, the violation of a statute (§605) is involved. That statute made it a crime to tap a telephone and reveal conversations. Even though the telephone was tapped pursuant to a state court order, the act was nevertheless criminal. Since it was a crime to tap and reveal, the exclusionary rule as a means of enforcement was never applied. In *People* v. *Kaiser,* 21 N. Y. 2d 86, 102, aff'd 394 U. S. 280, Judge Keating, writing for the majority, sums the situation up as follows:

> "Moreover, we are dealing here with the violation of a statute [605] which those charged with the primary and exclusive responsibility for its enforcement have continuously refused to enforce against State officials who, acting pursuant to State law, violate the statute. (Statement of Attorney General Robert F. Kennedy to Senate Judiciary Committee, March 29, 1962; Statement of Attorney General William P. Rogers, New York Times, Dec. 24, 1957, p. 10, col. 1.) If the statute is viable, let it be enforced. If the statute is flouted, let the offender be prosecuted. Because constitutional provisions carried no penal sanctions to discourage violation, exclusionary rules were necessary. No such problem is presented by a statute carrying penal sanctions."

In *Lee* v. *Florida,* 392 U. S. 378, this Court found as a fact that police were never prosecuted for violating Sec. 605. It therefore declared that the only way to enforce federal law was to invoke the exclusionary rule. And since the federal statute was violated on the day when the tapping took place, the Court held that the taps should not be used thereafter. Acts of legislatures are presumed to be constitutional until declared otherwise by the courts. But this is not true of statutory violations. Where a statute by its terms prohibits an act, it is the day of the violation that controls. The exclusion of evidence obtained by criminal acts is a means of enforcement of the statute. Writing for the majority in *Lee,* Mr. Justice Stewart said:

> "Finally, our decision today is counseled by experience. The hope was expressed in Schwartz v. Texas that '[e]nforcement of the statutory prohibition in §605 can be achieved under the penal provisions' of the Communications Act. 344 U. S., at 201, 97 L. Ed. at 235. That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for a violation of §605 since the statute was enacted. We conclude, as we concluded in *Elkins* and in *Mapp,* that nothing short of mandatory exclusion will compel respect for the federal law 'in the only effectively available way—by removing the incentive to disregard it.' *Elkins* v. *United States,* 364 U. S., at 217, 4 L. Ed. 2d at 1677."

In short, respondents' persistence in the intent to use illegal evidence hereafter despite this Court's bar as declared in *Lee* v. *Florida,* 392 U. S. 378, and *Fuller* v. *Alaska,* 393 U. S. 80, petitioner is plainly entitled to the protection

afforded by judicial mandate, and the petition for certiorari should be granted.

Dated New York, N. Y., March 24, 1970.

Respectfully submitted,

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